United Nations CAT/C/56/D/536/2013

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
11 February 2016

Original: English

Committee against Torture

Communication No. 536/2013

Decision adopted by the Committee at its fifty-sixth session (9 November-9 December 2015)

Submitted by:	H.B.A. et al. (represented by counsel, Katherine Gallagher and Matt Eisenbrant)
Alleged victims:	The complainants
State party:	Canada
Date of complaint:	14 November 2012 (initial submission)
Date of present decision:	2 December 2015
Subject matter:	Failure to initiate criminal proceedings against a former Head of State responsible for torture
Procedural issues:	Admissibility *ratione personae*
Substantive issues:	Impunity; obligations of States; jurisdiction (universal)
Articles of the Convention:	5 (2), 6 (1), 7 (1) and 22

GE.16-01908(E)

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Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-sixth session)

concerning

Communication No. 536/2013*

Submitted by:	H.B.A. et al. (represented by counsel, Katherine Gallagher and Matt Eisenbrant)
Alleged victims:	The complainants
State party:	Canada
Date of complaint:	14 November 2012 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 2 December 2015,

Having concluded its consideration of communication No. 536/2013, submitted to it by H.B.A. et al. under article 22 of the Convention,

Having taken into account all information made available to it by the complainants, their counsel and the State party,

Adopts the following:

Decision under article 22 (7) of the Convention against Torture

1. The complainants are H.B.A., a national of Yemen born in Saudi Arabia in 1985; S.H., a citizen of the Sudan born in Khartoum on 15 February 1969; M.K.T., a citizen of the Syrian Arab Republic born in Aleppo on 7 July 1983; and M.K., a citizen of Turkey born in Germany on 19 March 1983. They claim that Canada has violated their rights under articles 5 (2), 6 (1) and 7 (1) of the Convention. They are represented by counsel.

Facts as presented by the complainants

2.1 H.B.A. was captured in Karachi, Pakistan, in September 2002 at the age of 16. After being beaten and interrogated in Pakistan, he was transferred to the "dark prison" facility operated by the United States Central Intelligence Agency (CIA) in Afghanistan, where he was tortured for several days. He was subsequently transferred to Jordan, where the Jordanian intelligence service, in the presence of United States officials, tortured him. After 16 months, he was returned to the "dark prison" where he was tortured again, including by being subjected to sensory overload and deprivation.

* The following members of the Committee participated in the consideration of the present communication: Essadia Belmir, Alessio Bruni, Satyabhoosun Gupt Domah, Abdoulaye Gaye, Claudio Grossman, Sapana Pradhan-Malla, Jens Modvig, George Tugushi and Kening Zhang.

In May 2004, he was transferred to the United States military base in Bagram, Afghanistan, where the torture continued, including threats of harm to his family, being mauled by dogs and being electrocuted. In September 2004, he was transferred to the Guantánamo Bay detention camp, where he continued to endure physical and psychological abuse, including beatings, solitary confinement, extremes of heat and cold and sleep deprivation. As a result of the torture, he eventually gave his interrogators the answers they wanted. He still bears the scars resulting from the torture and remains in Guantánamo Bay, although he has never been charged with any crime.

2.2 S.H., a correspondent for Al-Jazeera, was arrested in December 2001 while working in Pakistan. He was detained and tortured in United States facilities in Bagram and Kandahar, Afghanistan, for nearly five months. He endured hooding, stress positions, nudity, extreme temperatures and beatings. He was told that he would be shot if he moved; on one occasion, military police officers pulled out the hairs of his beard one by one. He was transferred to Guantánamo Bay in June 2002. He was interrogated approximately 200 times and was routinely beaten, abused and subjected to various forms of mistreatment amounting to torture during his time there. He was held without charge until his release in May 2008.

2.3 M.K.T. was captured in Pakistan in late 2001 when he was 17, together with his father. He was detained and interrogated first in Pakistan, then handed over to United States officials and transferred to the United States-run prison in Kandahar, where his hand was fractured. He was subjected to torture in both locations. He was flown to Guantánamo Bay in February 2002. There he was subjected to physical and psychological abuse, including solitary confinement, sleep deprivation, constant noise, food deprivation, being doused with ice and cold water and sexual abuse. During his detention, his attorneys expressed grave concern about his mental condition and requested that the authorities improve his conditions and provide him with appropriate care. Those requests were denied. He attempted suicide while detained at Guantánamo Bay. He was released in August 2009 without ever having been charged with a crime. However, he remains separated from his family because he was resettled in Portugal while his father was resettled in Cabo Verde, and they have not been permitted to see each other.

2.4 M.K. was arrested in December 2001 at the age of 19 by Pakistani officials while on his way to the airport to return to Germany. He was detained for several days by the Pakistani security services. He was handed over to the United States military and taken to Kandahar, where he was physically abused and subjected to torture, including beatings, electric shocks, submersion in water and suspension from hooks for days at a time. In February 2002, he was transferred to Guantánamo Bay, where he was subjected to beatings, exposed to extreme heat and cold, shackled in painful stress positions and kept in solitary confinement on numerous occasions. He was released in August 2006 without ever having been charged with a crime.

2.5 The complainants submit that George W. Bush, who served as President of the United States of America and Commander-in-Chief of the United States Armed Forces from 20 January 2001 to 20 January 2009, exercised authority over the agencies of the Government of the United States. On 14 September 2001, Mr. Bush issued the Declaration of National Emergency by Reason of Certain Terrorist Attacks,[1] following the events of 11 September. That was the first of several directives that steadily expanded the powers vested in the CIA, the Secretary of Defense and the military to capture suspected terrorists and create extraterritorial detention facilities. On 13 November 2001, Mr. Bush authorized the detention of alleged terrorists—or "unlawful

[1] Available from www.federalregister.gov/articles/ 2001/09/18/01-23358/declaration-of-national-emergency-by-reason-of-certain-terrorist-attacks.

enemy combatants"—and their subsequent trial by military tribunals, which he ordered would not be subject to standard principles of law or the usual rules of evidence.[2] He also took action to strip detainees of the power to seek a remedy, not only in any United States court but also in "any court of any foreign nation, or any international tribunal".[3]

2.6 In early 2002, Mr. Bush decided that the Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention) did not apply to the conflict with Al-Qaida or members of the Taliban and that they would not receive the protections afforded under that convention.[4] Mr. Bush approved and oversaw a multifaceted global detention programme in which "enhanced interrogation" techniques were employed, including practices that constitute torture.[5] This system included a CIA detention programme directed at "high-value" detainees who were held at secret sites around the globe, the use of extraordinary rendition to send terrorist suspects or persons of interest to third countries known to employ torture, and detention by United States military and other government agents at locations outside the United States, including Guantánamo Bay, where detainees were subjected to acts of torture, including interrogation methods employed in the aforementioned CIA programme.[6] In his memoirs and elsewhere, Mr. Bush admitted that he personally authorized the waterboarding of detainees in United States custody as well as other interrogation techniques.[7]

2.7 In their joint report dated 27 February 2006, five special rapporteurs[8] arrived at the conclusion that the interrogation methods described met the definition of torture. In addition, jurisprudence from various international bodies qualifies the various interrogation methods authorized and overseen by Mr. Bush as torture and/or cruel, inhuman or degrading treatment, including exposure to extreme temperatures,[9] sleep deprivation,[10] punching or kicking,[11] isolation in "coffin" cells for prolonged periods,[12] threats of ill-treatment,[13] solitary confinement,[14] forced nudity[15] and waterboarding.[16]

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[2] Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism, *Federal Register*, vol. 66, No. 2, 16 November 2001, pp. 57831-57836. Available from www.fas.org/irp/offdocs/eo/mo-111301.htm.

[3] Ibid., sect. 7 (b) (2).

[4] John Yoo and Robert J. Delahunty, memorandum for William J. Haynes II, General Counsel, Department of Defense, United States Department of Justice, "Application of treaties and laws to al Qaeda and Taliban detainees", 9 January 2002, pp. 1 and 11.

[5] International Committee of the Red Cross, "ICRC report on the treatment of fourteen 'high value detainees' in CIA custody", report to John Rizzo, Acting General Counsel, CIA, 14 February 2007. Available from www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf.

[6] Memorandum for Record, Department of Defense, Joint Task Force 170, Guantanamo Bay, Cuba. Available from www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf.

[7] George W. Bush, *Decision Points* (Crown Publishing Group, 2010), pp. 169-171.

[8] Situation of detainees at Guantánamo Bay: report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on freedom of religion or belief; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (E/CN.4/2006/120).

[9] European Court of Human Rights, *Tekin v. Turkey* (application No. 64570/01), judgment of 19 July 2007 and *Akdeniz v. Turkey* (application No. 25165/94), judgment of 31 May 2005; Human Rights Committee, communication No. 577/1994, *Polay Campos v. Peru*, Views adopted on 6 November 1997, para. 9.

[10] European Court of Human Rights, *Ireland v. United Kingdom* (application No. 5310/71), judgment of 18 January 1978, para. 167.

[11] Committee against Torture, communication No. 207/2002, *Dimitrijevic v. Serbia and Montenegro*, decision adopted on 24 November 2004, para. 5.3; communication No. 269/2005, *Ben Salem v. Tunisia*, decision adopted on 7 November 2007, para. 16.4; communication No. 291/2006, *Ali v. Tunisia*, decision adopted on 21 November 2008, para. 15.4.

[12] Committee against Torture, summary account of the proceedings concerning the inquiry on Turkey, *Official Records of the General Assembly, Supplement No. 44* (A/48/44/Add.1), 1993, para. 52;

2.8 The complainants also submit that enforced disappearances and secret detentions[17] constitute torture, and they refer to the Committee's 2006 concluding observations in which the Committee states that the United States should ensure that no one is detained in any secret detention facility under its de facto effective control.[18] They refer as well to the report on the inquiry of the United States Senate Committee on Armed Services,[19] which found that "the abuse of detainees ... cannot simply be attributed to the actions of 'a few bad apples' acting on their own" but that "officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees".

2.9 The complainants submit that section 269.1 of the Criminal Code of Canada, which gives the State party jurisdiction over the offence of torture, "reflects the recognition of Parliament that freedom from such intentional mistreatment is a basic human right".[20] The provision explicitly applies to officials and persons acting at the direction or with the acquiescence of an official. Under sections 21 and 22 of the Code, liability extends to persons who commit an offence and those who aid, abet, form a common intention to carry out, counsel, procure, solicit or incite another person to be a party to the offence. Section 7 (3.7) of the Code gives the State party jurisdiction over torture committed abroad when the accused is present in territory under the State party's jurisdiction.

2.10 The complainants submit that, on 19 September 2011, Mr. Bush travelled to Toronto to give a talk. At the time, it was widely reported that Mr. Bush would again

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Human Rights Committee, communication No. 1020/2001, *Cabal and Pasini v. Australia*, Views adopted on 7 August 2003, para. 8.4.

[13] Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (A/56/156), 2001; Human Rights Committee, communication No. 74/1980, *Estrella v. Uruguay*, Views adopted on 29 March 1983; European Court of Human Rights, *Campbell and Cosans v. United Kingdom* (applications No. 7511/76 and No. 7743/76), judgment of 23 March 1983, para. 26 and *Gäfgen v. Germany* (application No. 22978/0), judgment of 1 June 2010, paras. 91 and 108; Committee against Torture, summary account of the results of the proceedings concerning the inquiry on Peru, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 44* (A/56/44), 2001, chap. V, sect. B, para. 186; concluding observations on Denmark, *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 44* (A/57/44), 2002, chap. III, para. 74 (c)-(d); concluding observations on Denmark (CAT/C/DNK/CO/5), 2007, para. 14; concluding observations on Japan (CAT/C/JPN/CO/1), 2007, para. 18; Human Rights Committee, general comment No. 20 (1992) on article 7, para. 6; concluding observations on Denmark (CCPR/CO/70/DNK), 2000, para. 12; *Polay Campos v. Peru*, para. 8.6; and communication No. 265/1987, *Vuolanne v. Finland*, Views adopted on 7 April 1989, para. 9.5.

[14] E/CN.4/2006/120, paras. 53 and 87; report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/63/175), 2008, paras. 70-85; Istanbul Statement on the Use and Effects of Solitary Confinement; Basic Principles for the Treatment of Prisoners, principle 7.

[15] Committee against Torture, *Ali v. Tunisia*, para. 15.4; European Court of Human Rights, *Vala Šinas v. Lithuania* (application No. 44558/98), judgment of 24 July 2001.

[16] G. D. Solis, *The Law of Armed Conflict: International Humanitarian Law at War* (Cambridge University Press, 2010), pp. 461-466; transcript of Senate confirmation hearings nominating Eric Holder as Attorney General of the United States, 16 January 2009, available from www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r¼1&pagewanted¼all; E. Wallach, "Drop by drop: forgetting the history of water torture in U.S. courts", *Columbia Journal of Transnational Law*, vol. 45, No. 2 (2007).

[17] Human Rights Committee, communication No. 440/1990, *El-Megreisi v. Libyan Arab Jamahiriya*, Views adopted on 23 March 1994, para. 5.4.

[18] CAT/C/USA/CO/2, 2006, para. 17.

[19] Senate Armed Services Committee, Inquiry into the Treatment of Detainees in U.S. Custody, 20 November 2008. Available from www.armed-services.senate.gov/imo/media/doc/Detainee-Report-Final_April-22-2009.pdf.

[20] Federal Court of Appeal, Ottawa, Ontario, *Canada (Prime Minister) v. Khadr*, judgment of 14 August 2009, para. 51.

travel to Canada, this time to British Columbia on 20 October 2011, to appear as a speaker at an economic forum. In anticipation of Mr. Bush's October 2011 visit, the complainants' counsel formally called upon the Attorney General of Canada to launch a criminal investigation against Mr. Bush for his role in authorizing and overseeing his administration's torture programme. This letter, dated 29 September 2011, was supported with an extensive draft indictment setting forth the factual and legal basis for charging Mr. Bush with torture as well as approximately 4,000 pages of evidence. It further stated that if the Attorney General refused to launch a criminal investigation against Mr. Bush, the complainants would pursue private prosecution against him. The Attorney General provided no response prior to Mr. Bush's visit, despite a follow-up letter dated 14 October 2011.

2.11 On 18 October 2011, the complainants' counsel attempted to file an information under section 504 of the Criminal Code before a justice of the peace in the Provincial Court of Surrey. The information included four counts, one each for the torture of the four complainants (private prosecution). The justice of the peace refused to receive the information on the ground that Mr. Bush was not present on Canadian territory. On 20 October 2011, the counsel provided evidence to the contrary. The justice of the peace accepted the information, assigned a number to the file and scheduled a hearing for January 2012.

2.12 Almost simultaneously, the Attorney General of British Columbia stated that the Criminal Justice Branch of British Columbia had decided to stay the proceedings based on the assumption that the consent of the Attorney General of Canada would not be obtained in the case. However, the consent of the Attorney General of Canada was never officially sought. On 7 November 2011, nearly three weeks after Mr. Bush's visit, the Ministerial Correspondence Unit of the federal Ministry of Justice responded to the 29 September 2011 letter to the Attorney General, confirming receipt of the letter and stating that the letter had been transmitted to the appropriate officials. No further action was taken by the authorities of the State party.

The complaint

3.1 The complainants submit that the State party violated its obligations under the Convention, specifically those emanating from articles 5 (2), 6 (1) and 7 (1) of the Convention.

3.2 The complainants submit that they consider themselves victims of a violation of their rights by the State party, which has made a declaration recognizing the Committee's competence to receive and consider communications under article 22 (1) of the Convention. The communication alleges facts that, prima facie, constitute serious violations of the Convention. The subject matter of the present complaint has not been and is not being examined under another procedure of international investigation or settlement. The complainants took all steps available to them, under the circumstances of this case, to effect the State party's compliance with its obligations under the Convention. The lack of any response by the Attorney General of Canada, the letter from the Ministerial Correspondence Unit and the direct intervention by the Attorney General of British Columbia to block the private prosecution all show that Canadian officials had no intention of pursuing this matter. No other domestic options are available in the State party, as judicial review of matters of prosecutorial discretion is generally not permitted[21] and previous attempts to obtain judicial review concerning stays of private prosecutions have failed.[22]

[21] Supreme Court of Canada, *Krieger v. Law Society (Alberta)*, judgment of 10 October 2002 and *R. v. Power*, judgment of 14 April 1994.

[22] Court of Appeal for British Columbia, *Davidson v. British Columbia (Attorney General)*, judgment of 11 October 2006.

3.3 The complainants submit that the State party has violated article 5 (2) of the Convention by failing to take all measures necessary to ensure that jurisdiction was properly established and/or exercised when an alleged torturer was present in its territory. The State party did not extradite him either.

3.4 The complainants submit that the State party has violated article 6 (1) of the Convention by failing to take Mr. Bush into custody or to take other legal measures to ensure his presence following an examination of the evidence provided to Canadian officials, including the draft indictment, the information filed by the complainants and the supporting materials thereto.

3.5 The complainants maintain that the present case demonstrates a failure by the State party to abide by its obligations under the Convention to initiate proceedings when a torture suspect is present in its territory. This failure serves as a serious challenge to the effectiveness of the Convention and obstructs its goal of ending impunity for torture. In failing to prosecute Mr. Bush, the State party undermined its stated commitment to combat torture, ignored the jurisdictional authority provided by the Criminal Code and violated its obligations under the Convention.

3.6 The complainants submit that when a private prosecution was launched, the well-documented case was blocked almost immediately. Given that the Attorney General of British Columbia brought an end to the prosecution within hours after it was filed, it is clear that the extensive evidence in the case was not even reviewed, in violation of article 6 of the Convention. Furthermore, the State party's obligation to extradite or prosecute suspected torturers within its jurisdiction cannot be ignored on the basis of political expediency, as it appears was done in this situation, in violation of article 7 of the Convention.

3.7 The complainants submit that by failing to prosecute Mr. Bush, the State party denied survivors an important opportunity to seek accountability and justice for the torture they suffered.

3.8 The complainants refer to the Committee's jurisprudence in *Guengueng et al. v. Senegal*,[23] where the Committee found that a State party had violated its obligations under articles 5, 6 and 7 of the Convention by not prosecuting a former Head of State for ordering acts of torture.

State party's observations on admissibility[24]

4.1 In a letter dated 8 October 2013, the State party submitted that while the exercise of extended criminal jurisdiction by States parties to the Convention is an effective weapon in the fight against impunity, it does not displace obligations of procedural fairness and natural justice owed to persons alleged to have committed crimes. The text of the Convention as a whole makes it clear that criminal prosecution should be pursued only when sufficient evidence is available such that it is possible to respect the rights embedded in a fair criminal process.

4.2 The State party submits that articles 5-7 of the Convention must be read together and in relation to the treaty as a whole. It notes that the obligation to proceed ex officio with a criminal investigation into alleged acts of torture rests with the State where the crimes were committed. The Convention obligation of a State to investigate allegations of torture committed by a foreign perpetrator in another State arises only with the presence of the alleged perpetrator in territory under its jurisdiction. The State party further submits that the obligation under article 6 to take measures to ensure the

[23] Communication No. 181/2001, decision adopted on 17 May 2006.

[24] The parties to the communication have submitted arguments regarding both the admissibility and the merits, but only the arguments pertaining to the admissibility are included in the present text.

continuing presence of an alleged perpetrator is not absolute. Article 6 (1) recognizes that there may be occasions when the circumstances do not warrant ensuring the continued presence of an individual for the purpose of criminal proceedings.

4.3 The State party submits that its actions in relation to the visit of former President Bush were not inconsistent with its obligations under the Convention, highlighting the reasonable application of both police investigative discretion and prosecutorial discretion in establishing whether to follow up on the complaint filed by the complainants. The State party asserts that no prosecution could go forward on the basis of the information package assembled by the complainants because it did not meet the evidentiary burden required to lay charges or obtain a conviction. Most of the publicly available information is not evidence admissible in a Canadian criminal trial. The State party submits that at the relevant time its police services did not have access to other evidence sufficient to warrant criminal charges against Mr. Bush for torture. The State party notes that although some of the alleged acts of torture referred to in the present communication occurred outside the territory and jurisdiction of the United States, the acts of Mr. Bush relevant to the allegations against him were executive acts, any evidence of which would exist only in the United States. In the absence of a reasonable expectation of assistance from the United States for an investigation into the allegations against Mr. Bush, the State party had no basis on which to take him into custody; his detention for the purposes of article 6 was not warranted.

4.4 The State party argues that the communication is without merit as it does not establish any violation of the Convention by the State party. Canadian law criminalizes torture and provides extraterritorial jurisdiction over the crime of torture consistent with its obligations under article 5 of the Convention. The laws and practice of the State party foster accountability for perpetrators of serious crimes such as torture. The State party submits that, as required by article 4 of the Convention, it has enacted the crime of torture in its criminal law, under section 269.1 of the Criminal Code. Consistent with the obligations under article 5 (2) of the Convention, the Criminal Code of Canada extends prescriptive and adjudicative jurisdiction over the crime of torture where the offence occurs outside Canada and neither the victim nor the alleged offender is a citizen of Canada.

4.5 The State party submits that, according to section 504 of the Criminal Code, anyone may initiate a private prosecution by laying information in respect of an indictable offence. The relevant judge must hold a hearing to confirm the charges, at which the allegations and evidence are examined to determine if they warrant the issuance of a summons or warrant for the arrest of the accused. The Attorney General must be given a copy of the information and notice of the time of the hearing. The procedure for private prosecutions is governed by section 507.1 of the Code. Private individuals who lay information must have reasonable grounds to believe that the person accused has committed an indictable offence, but they are not bound by the public law duties that apply to either police services or public prosecutors and do not have to meet a threshold of reasonable prospect of conviction. As private prosecutions may be subject to abuse, Crown prosecutors (on behalf of the relevant Attorney General) must receive a copy of the information and be given the opportunity to attend a hearing before the judge may issue a summons or warrant for the arrest of the accused. In busy jurisdictions, a court often faces delays of some weeks or months in the scheduling of hearings. Where the consent of the Attorney General is required within eight days for a prosecution to proceed, as was the case here, it is prudent for the informant to obtain that consent prior to the laying of an information. Crown prosecutors may intervene in a private prosecution, may take over its conduct, may direct a stay of the private prosecution, or may take no action.

4.6 The State party maintains that the procedures necessary for a private prosecution are well known in the legal community and that the requisite knowledge is easily attainable: the Criminal Code is publicly available and this procedure has been the subject of a published decision of the British Columbia Court of Appeal.[25] The consent of the Attorney General of Canada is required in order for a court to proceed with a prosecution of a non-citizen for acts of torture committed outside the national territory, both for public and private prosecutions. The authority to decide whether consent will be granted is delegated to Chief Federal Prosecutors in consultation with the relevant Deputy Director of the Public Prosecution Service of Canada and is a matter subject to prosecutorial discretion. The general objective of that requirement is the prevention of unwarranted prosecutions. In the case of a private prosecution of non-citizens for foreign crimes, the consent of the Attorney General is required also as a means of preventing the unwarranted detention of an individual so as not to violate the right to liberty.

4.7 The State party submits that, on 11 September 2011, the Royal Canadian Mounted Police, which is responsible for investigations of crimes at the federal level, received complaints concerning the conduct of Mr. Bush but determined that a criminal investigation was not warranted, since it was highly unlikely that the Royal Canadian Mounted Police would be able to gather sufficient evidence to lay an information before a judge. The State party submits that in advance of Mr. Bush's visits the complainants had sent an information to the Attorney General of Canada seeking an investigation into the allegations of the involvement of the former President of the United States in acts of torture. While the Attorney General does not investigate this type of crime, the question of whether to launch an investigation or a possible prosecution was brought to the attention of Canadian officials. The State party submits that, as the complainants had asked the Attorney General to launch a criminal investigation, they recognize themselves that what was needed was an investigation into the alleged crimes in order for the police to gather evidence admissible in a criminal trial and "must be taken to understand that the 'information package' was not evidence admissible in a Canadian criminal trial". The State party submits that the complainants did not seek the consent of the Attorney General to pursue a private prosecution, nor have they explained why they did not seek that consent when they wrote to him. The State party further observes that the timing and volume of information provided by the complainants would not have permitted a thorough investigation within the few weeks before the visit of Mr. Bush. The timing was also inadequate for a properly informed decision to be made on the issue of consent under section 7 (7), assuming it had been requested.

4.8 The State party submits that on the morning of Mr. Bush's visit on 20 October 2011, the complainants' counsel attended court in Surrey, British Columbia, to lay an information against Mr. Bush and that the justice of the peace scheduled a hearing for the next available date, 9 January 2012, and sent a copy of the information to the British Columbia Crown prosecutor. The Criminal Justice Branch of the Ministry of Justice of British Columbia then contacted the Public Prosecution Service, which informed it that there was no consent of the Attorney General of Canada under section 7 (7) for the prosecution of Mr. Bush, because no request for consent had been made. The State party also observes that since the Royal Canadian Mounted Police had not launched or conducted a criminal investigation, it had not previously sent any potential charges to the Service for review.

4.9 On the afternoon of 20 October 2011, a Crown prosecutor for the Province of British Columbia, exercising the authority of the Attorney General of British Columbia to intervene pursuant to section 579 (1) of the Criminal Code, directed a

[25] See *Davidson v. British Columbia (Attorney General)*.

stay of proceedings with respect to the private information. The State party notes that the decision to direct a stay of the private prosecution was an independent exercise of prosecutorial discretion by the Criminal Justice Branch of the Ministry of Justice of British Columbia. The State party notes that, although it was a provincial Crown prosecutor who directed the stay of the private prosecution, the absence of consent on the part of the Attorney General of Canada would in any case have resulted in the discontinuation of the proceedings once the eight-day time limit had passed.

4.10 The State party submits that the allegation of a violation of article 5 (2) of the Convention is inadmissible pursuant to article 22 (2) as an abuse of the right of submission because the allegation has not been substantiated. The Criminal Code provides extended jurisdiction over the crime of torture, as required by the terms of article 5 of the Convention. Paragraph (e) of subsection 3.7 of section 7 of the Criminal Code extends the State party's criminal jurisdiction over all acts of torture committed outside of the national territory if "the person who commits the act or omission is, after the commission thereof, present in Canada". The State party submits that article 5, in both paragraph 1 and paragraph 2, requires States parties to establish jurisdiction over the crime of torture in the specified circumstances. The State party notes that in their communication the complainants acknowledge that the State party has extended its jurisdiction over foreign acts of torture as required by article 5 (2).

4.11 The State party submits that the Committee lacks competence to consider the alleged violations as the complainants are not Canadian citizens and are not and have not been subject to the jurisdiction of the State party, which is a requirement for a complaint under article 22 of the Convention. The State party observes that the communication itself provides certain details concerning the past and current location of each of the complainants without establishing in any way that any of them were present in the territory of the State party or subject to its jurisdiction at any time relevant to the complaint. Moreover, the complainants have made no attempt to establish that they were subject to the jurisdiction of the State party at any relevant time. The State party does not accept that the complainants were subject to its jurisdiction by reason of the laying of the "private information" or at any relevant time and submits that they are not now within the jurisdiction of the State party. The State party has never accepted and does not accept the competence of the Committee to hear communications from individuals not subject to its jurisdiction.

4.12 The State party notes that the Committee has taken a potentially contrary view in *Guengueng et al. v. Senegal*,[26] where the Committee rejected the inadmissibility argument of Senegal on the basis of its lack of jurisdiction over the victims. The Committee appeared to have taken the view that the Chadian claimants had become subject to the jurisdiction of Senegal in instituting proceedings against Hissène Habré in the Senegalese courts.[27] The Committee expressed the view that the principle of universal jurisdiction enunciated in articles 5 (2) and 7 of the Convention implies that the jurisdiction of States parties must extend to potential complainants in circumstances similar to the complainants'.[28] The State party maintains that this view, which suggests that complainants need not be subject to the jurisdiction of the State party, is inconsistent with the explicit text of article 22 (1) of the Convention, which clearly requires that complainants must be or have been subject to the jurisdiction of the State with respect to the violations of which they claim to be victim.

4.13 The State party further refers to the decision of the Committee in *Rosenmann v. Spain*,[29] where it considered that the complainant was not a victim of the alleged

[26] See note 23 above.
[27] See *Guengueng et al. v. Senegal*, para. 6.3.
[28] Ibid., para. 6.4.
[29] Communication No. 176/2000, decision adopted on 30 April 2002.

violations by Spain because he was not personally and directly affected by the alleged breach in question and was not a civil party to the criminal proceedings in Spain,[30] and found the communication inadmissible. The State party submits that according to Canadian criminal law informants are not a "party" to the prosecution and cannot be said to "accept" or be subject to the jurisdiction of the State party simply by attempting, through representatives, to pursue a criminal prosecution. Furthermore, the State party submits that victims of torture have no personal right to the prosecution of their alleged torturers such that they have standing under article 22 to raise issues of the appropriate exercise of prosecutorial discretion in any State through which the alleged perpetrator may pass.

4.14 The State party further notes that article 13 of the Convention stops short of guaranteeing to victims a personal right to a criminal prosecution of those they allege to be guilty of torture. Article 13 must be read consistently with the Convention as a whole, which makes it clear that States parties retain discretion as to whether to detain an individual for purposes of pursuing an investigation (art. 6) and whether a complaint warrants the laying of charges (art. 7).

4.15 The State party observes that the obligation under article 6 (1) of the Convention is not absolute and that States parties retain a certain amount of discretion in that a State must act only upon being satisfied, after an examination of information available to it, that the circumstances so warrant. The State party refers to the opinion of Burghers and Danelius[31] and submits that, upon an examination of the information available, the circumstances may not warrant restricting the liberty of an alleged perpetrator in order to ensure his continued presence.

4.16 The State party further observes that article 6 imposes additional obligations on States parties once an alleged torturer is in custody, including the obligation under paragraph 2 to immediately make a preliminary investigation into the facts. Where an alleged perpetrator is in transit through a State or a temporary visitor rather than someone resident in the State, it is unlikely that the forum State will have undertaken an investigation in advance, *proprio motu*, in the hope or expectation that the alleged perpetrator might transit through or make a short visit. The State party notes that the facts of this communication are significantly different from those in *Guengueng et al.*,[32] as Mr. Habré was resident in Senegal for many years and the Government of Senegal had a lot of time in which to launch and complete an investigation.

4.17 The State party submits that the investigation of a case of the magnitude of the allegations made by the complainants is a complex matter and provides an example where an investigation into war crimes allegations had taken three years to complete. It further submits that, in a common law jurisdiction, any decision on whether to detain an alleged perpetrator in transit through the State will require a consideration of the results of the criminal investigation. The power of arrest is predicated upon reasonable and probable grounds to believe an offence has been committed. As a general rule, no one may be held in detention for more than 24 hours before being brought before a justice. Unless charges are laid within that time period, detention cannot continue. In the Canadian criminal justice system, the investigation must precede the detention. As noted above, in the circumstances of the complaints against Mr. Bush, the Royal Canadian Mounted Police, in the independent exercise of its discretion, had not conducted such an investigation. There was no realistic prospect, in October 2011, that sufficient evidence to support a charge against Mr. Bush could

[30] Ibid., para. 6.4.

[31] J. Herman Burghers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Martinus Nijhoff, 1988), p. 134; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgement*, I.C.J. Reports 2012, p. 144.

[32] *Guengueng*, note 23 above; *see also Belgium v. Senegal*.

have been assembled so as to justify detention. Article 6 of the Convention, particularly when read in conjunction with article 7 (2), cannot reasonably be interpreted to require taking a person into custody under such circumstances.

4.18 The State party refers to the opinion of Nowak and McArthur[33] and maintains that under article 7 the Convention only obligates States parties to pursue prosecutions of cases that are fit for prosecution. If the prosecuting authorities are of the view that the evidence is insufficient to obtain a conviction, the State party does not violate its obligation under article 7 (1) to submit the case to its competent authorities by not prosecuting an alleged perpetrator. International law cannot and does not obligate police services to conduct an unwarranted investigation when such police services, acting independently and in exercise of their police investigative discretion, determine that an investigation is unwarranted. The State party submits that the Royal Canadian Mounted Police had concluded that they neither possessed key evidentiary elements nor were likely to obtain them, so they did not launch an investigation, and it maintains that the above was an entirely reasonable conclusion.

Complainants' comments on the State party's observations

5.1 In comments dated 30 December 2013, the complainants challenged the State party's assertion that article 5 (2) of the Convention only provides the obligation to "establish" universal jurisdiction over the offence of torture when the perpetrator is present in its territory and that Canada had done so by enacting section 7 (3.7) of the Criminal Code. They maintain that the obligation in article 5 (2) to take such measures as may be necessary to establish its jurisdiction requires not simply the enactment of domestic law to permit universal jurisdiction, but also the exercise of such jurisdiction where appropriate. They clarify that they are in agreement with the State party that the question of extradition does not arise on the facts and note that, according to the Committee's findings in *Guengueng et al.*, an extradition request is not required to trigger a State's obligations under article 5 (2)

5.2 The complainants challenge the State party's submission that article 22 (1) of the Convention precludes the Committee's consideration of the communication because the complainants are not and have never been subject to the State party's jurisdiction. They maintain that the State party relies inappropriately on *Rosenmann v. Spain*,[34] and confuses the concept of jurisdiction with the concept of standing. The complainants are victims of torture, each of whom moved to initiate criminal proceedings in the State party when the individual that they allege bears individual criminal responsibility for torture was present in the State party. The complainants are individually and directly affected by the State party's violations of articles 5, 6 and 7 of the Convention arising out of its failures to exercise jurisdiction when an alleged torturer was present in its territory; initiate a preliminary inquiry against him, stemming from the information provided by the complainants and available to it; ensure his presence; and submit the case to the competent authorities for the purpose of prosecution. By ratifying and implementing the Convention, including enacting legislation to exercise its jurisdiction over alleged torturers present in its territory and lodging a declaration under article 22, the State party accepted jurisdiction over all victims of alleged torturers present in the State party.[35]

5.3 The complainants also challenge the State party's argument that jurisdiction ought to be defined according to the domestic law of the State against which the

[33] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford, Oxford University Press, 2008), p. 361. See also the decision of the International Court of Justice in *Belgium v. Senegal*, paras. 89 et seq.

[34] See note 29 above.

[35] The complainants refer to *Guengueng et al. v. Senegal*, paras. 6.3 and 6.4.

complaint is launched and maintain that such an approach would render complaints to the Committee illusory with regard to claims concerning universal jurisdiction. They also maintain that the State party has provided no support in domestic law for its claim that victims must be present in the territory of Canada to be subject to its jurisdiction. In fact, section 7 (3.7) of the Criminal Code states: "Every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence ... shall be deemed to commit that act or omission in Canada if ... (e) the person who commits the act or omission is, after the commission thereof, present in Canada." This section does not merely give the State party universal jurisdiction over any alleged torturer present in its territory, but actually deems the torture to have been effectively committed in Canada. Presumably, the State party would not argue that it does not have jurisdiction over a victim of acts of torture committed in Canada. Therefore, when section 7 (3.7) of the Criminal Code makes any act of torture, wherever committed, the equivalent of torture committed in Canada, the State party has jurisdiction over the victims of any alleged torturer later found in Canada.

5.4 The complainants maintain that the facts of their case are parallel to the facts in *Guengueng et al.*, where the Committee found that the Chadian complainants accepted Senegalese jurisdiction in order to pursue the proceedings against Hissène Habré which they instituted. The complainants in the instant case gave authorization for a private prosecution to be initiated before a Canadian court and therefore accepted the State party's jurisdiction. A justice of the peace accepted the information and a hearing was scheduled. A provincial government official put an end to the private prosecution the same day it was filed, in conferral with the Public Prosecution Service; the Service did not have any potential charges against Mr. Bush because the Royal Canadian Mounted Police had never launched an investigation. When the provincial official shut down the private prosecution, he did so without asking police to conduct the necessary inquiry under article 6 of the Convention and did not make his own independent assessment of the allegations. The complainants further distinguish the jurisprudence in *Rosenmann v. Spain*, because there the complainant was asserting a violation of article 5 (1) (c) of the Convention, which contains a level of discretion for the establishment of jurisdiction ("if that State considers it appropriate") that is not present in article 5 (2). The complainants also maintain that in *Rosenmann* the issue was whether the complainant had standing to bring the complaint, which is a concept distinct from jurisdiction.[36]

State party's additional observations

6.1 In additional observations dated 11 April 2014, the State party submitted that article 22 (1) of the Convention gives locus standi only to individuals subject to the jurisdiction of the State party against which the complaint is made and reiterated that the complainants have never been subject to its jurisdiction, that in the absence of its jurisdiction over the complainants they lack standing to bring a communication before the Committee and that the Committee lacks competence at law to consider their communication.

6.2 The State party notes that, after the fourth revision of the Committee's rules of procedure, the relevant rule (rule 113) no longer includes a reference to the jurisdiction of the State party. It observed, however, that in *Agiza v. Sweden*,[37] the Committee had acknowledged the importance for the right of complaint of the victim

[36] The complainants maintain that some torture victims may not have standing to bring a complaint before the Committee even when they might be subject to a State party's jurisdiction for the purposes of article 22 and refer to Nowak and McArthur, where the issue of standing was distinguished from the issue of "subject to its jurisdiction".

[37] Communication No. 233/2003, decision adopted on 20 May 2005.

being within the jurisdiction of the State.[38] The State party maintains that in accordance with that decision the victim must have been under the jurisdiction of the State party at some point relevant to the alleged violations and asserts that the complainants in the present case had never been within its jurisdiction. It reiterates that the attempt to initiate private prosecution against Mr. Bush through a representative did not bring the complainants within its jurisdiction. The State party notes that the information submitted before a justice of the peace in British Columbia regarding acts of torture committed against the complainants gives the name of a director of a non-governmental organization as the person laying the charges, with the complainants listed only as victims of torture. It maintains that the status of a victim does not bring an individual within the jurisdiction of a court in Canada. A person seeking to commence a private prosecution must appear before the judge who receives the information as the laying of criminal charges proceeds by an individual swearing to the truth of the information and any supporting facts; the individual must be within the jurisdiction of the court for purposes of enforcement of any orders against them, inter alia so that they may be held accountable for malicious prosecution.

Complainants' additional comments on the State party's observations

7.1 In additional observations dated 8 May 2014, the complainants submitted that Mr. Bush was scheduled to return to Canada on 12 May 2014 to appear at an event being held in Toronto. They submitted that in the light of the factual record, previously submitted to the Canadian authorities, the State party must take steps to ensure custody over, investigate and prosecute Mr. Bush. They reiterated that the State party's obligations under the Convention included preventing and punishing acts of torture and redressing such acts pursuant to articles 5, 6 and 14 of the Convention. Allowing Mr. Bush to be present on Canadian territory without consequence would leave the State party open to the charge of being a "safe haven" for torturers.

7.2 In a letter dated 17 July 2014, the complainants submitted that they agreed that article 22 (1) of the Convention requires the complainants to be subject to the jurisdiction of the State party mentioned in the communication; they referred, however, to the Committee's decision in *Guengueng et al.*[39] and argued that when an alleged torturer is present in the territory of a State party, that State's jurisdiction extends to all victims of the latter. The complainants also reiterated that the filing of a private prosecution on behalf of and with the permission of the complainants against Mr. Bush, prepared specifically for submission to a Canadian court, brings the case within the ambit of *Guengueng et al.* They also reiterated that the State party had violated its obligations under article 5 by failing to exercise universal jurisdiction; article 6 by failing to properly examine the information provided by the complainants, failing to take measures to ensure custody over Mr. Bush and failing to commence a preliminary inquiry of the facts; and article 7 by failing to submit the case against Mr. Bush to the competent authorities for the purpose of prosecution.

State party's further observations

8. In a letter dated 23 October 2014, the State party referred to its previous submissions and maintained that its arguments applied with equal force to events occurring before and after 2011.

[38] Ibid., para. 13.9.
[39] See paras. 6.3 and 6.4.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any complaint contained in a communication, the Committee must decide whether the complaint is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

9.2 The complainants maintain essentially that the State party failed to honour its obligations under the Convention by violating article 5 (2) and article 7 (1) in view of the following considerations:

- The failure of the Attorney General of Canada to reply to the letter dated 29 September 2011 sent by the complainants' counsel on their behalf, requesting that an investigation be launched against Mr. Bush in conjunction with his presence in British Columbia starting on 20 October 2011
- The letter from the Ministerial Correspondence Unit of the federal Ministry of Justice dated 7 November 2011, i.e. three weeks after Mr. Bush's visit, replying to the 29 September 2011 letter and indicating that the latter had been transmitted to the appropriate officials
- The direct intervention of the Attorney General of British Columbia, which resulted in a stay of the private prosecution that had been initiated before a justice of that province.

9.3 With regard to the lack of a reply from the Attorney General of Canada and the letter from the Ministerial Correspondence Unit, the Committee takes note of the State party's assertion that its actions in relation to the visit of Mr. Bush were not inconsistent with its obligations under the Convention in view of the "reasonable application of both police investigative discretion and prosecutorial discretion in establishing whether to follow up on the complaint filed by the complainants". According to the State party, "prosecution could not go forward based on the information package assembled by the complainants because it did not meet the evidentiary burden required to lay charges or obtain a conviction". The State party thus concluded that "the communication was without merit, as the complainants had not established that the State party had violated the Convention". The Committee notes that, in the letter addressed to the Attorney General of Canada, the complainants' counsel indicated their intention to pursue private prosecution, without requesting advance consent from the Attorney General, in the event that the Attorney General did not launch an investigation. The Committee observes that the option for the complainants to pursue private prosecution in the absence of advance consent by the Attorney General, which is an option that exists in other countries as well, was taken advantage of by the complainants through the filing of the information with a justice in British Columbia.

9.4 With regard to the stay of private prosecution resulting from the intervention of the Attorney General of British Columbia in the absence of advance consent by the Attorney General of Canada, the complainants submit that the State party's obligation under article 5 (2) of the Convention entails not just the adoption of domestic legislation establishing universal jurisdiction but also the exercise of that jurisdiction when circumstances call for it. The complainants dispute the State party's position that, under article 22 (1) of the Convention, the Committee lacks competence to consider the communication.

9.5 The Committee notes the State party's submissions that the Committee lacks competence to consider the alleged violations as the complainants are not and have

never been subject to the jurisdiction of the State party, which is a requirement for a complaint under article 22 of the Convention; the complainants are not Canadian citizens; and they have not established that any of them were present in the territory of the State party or subject to its jurisdiction at any time relevant to the complaint. The Committee also takes note of the State party's submission that the information submitted before a justice of the peace in British Columbia regarding acts of torture committed against the complainants gives the name of a director of a non-governmental organization as the person laying the charges, with the complainants listed only as victims of torture, and that the status of victim does not bring an individual within the jurisdiction of a court in Canada, because a person seeking to commence a private prosecution must appear in person before the judge who receives the information and swear to the truth of the information and any supporting facts.

9.6 The Committee notes the complainants' submission that the State party, by ratifying the Convention, enacting legislation to exercise its jurisdiction over alleged torturers present in its territory and lodging a declaration under article 22 of the Convention, accepted jurisdiction over all victims of alleged torturers present in the State party; and that the fact that a stay was ordered on the private prosecution brought on behalf of and with the permission of the complainants against Mr. Bush, prepared specifically for submission to a Canadian court, brings the case within the jurisdiction of the Committee.

9.7 The Committee recalls its finding that in order to establish whether a complainant is effectively subject to the jurisdiction of the State party against which a communication has been submitted within the meaning of article 22, the Committee must take into account various factors that are not confined to the complainant's nationality; in this regard, a decisive factor is whether the complainant has accepted the jurisdiction of a particular State party in order to pursue the proceedings that the complainant has initiated against an alleged perpetrator of torture.[40] The Committee observes that the alleged violations of the Convention concern the refusal of the Canadian authorities to apprehend and prosecute the former President of the United States, George W. Bush, despite their obligation to establish universal jurisdiction in accordance with articles 5 (2), 6 (1) and 7 (1) of the Convention. The question before the Committee therefore is whether the complainants in the present case have demonstrated that they were subject to the jurisdiction of Canada. The Committee notes that the complainants maintain that the facts of their case are parallel to the facts in *Guengueng et al.*, where the Committee found that the Chadian complainants accepted Senegalese jurisdiction in order to pursue the proceedings against Hissène Habré which they had instituted.[41] However, the Committee observes that in the *Guengueng* case the State party did not dispute that the complainants were the plaintiffs in the proceeding brought against Mr. Habré in Senegal[42] while in the instant case the State party disputes that the complainants were party to the private prosecution brought against Mr. Bush in Canada.[43] This difference between the two cases has to be duly evaluated by the Committee. In the *Guengueng* case, the Committee concluded that "On the basis of these elements, the Committee is of the opinion that the complainants were indeed subject to the jurisdiction of Senegal in the dispute to which the communication referred[44] and declared the communication admissible.

9.8 However, in the instant case, the Committee observes that the criminal information submitted before a justice of the peace in British Columbia on 18 October

[40] See *Guengueng et al. v. Senegal*, para. 6.3.
[41] Ibid., para. 5.4.
[42] Ibid., para. 6.3.
[43] Ibid., paras. 6.1 and 6.2.
[44] Ibid., para. 6.3.

2011 was in fact signed by the Director of the Canadian Centre for International Justice and that the information before the Committee does not show that the complainants, who are listed as torture victims in the above criminal information, have authorized the latter to act as their representative before the Canadian courts for the purpose of initiating a private prosecution. The Committee further observes that in the instant case the complainants did not present proof that they were a party to any other proceedings formally instituted in Canada in relation to Mr. Bush. The Committee accordingly concludes that the complainants were not subject to the jurisdiction of Canada in the dispute to which this communication refers.

10. The Committee therefore decides:

(a) That the communication is inadmissible under article 22 (1) of the Convention;

(b) That the present decision shall be communicated to the complainants and to the State party.